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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 887

HARMOND E. GENSTIL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The district court wrote no opinion. The opinion of the court of appeals (Pet. 19-24) is reported at 326 F. 2d 243.

JURISDICTION

The judgment of the court of appeals was entered on January 13, 1964. On February 4, 1964, Mr. Justice Goldberg extended the time within which to file a petition for a writ of certiorari to March 4, 1964.

The petition was filed on March 3, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the district court complied with the provisions of the Jencks Act relating to production of prior written statements of government witnesses upon motion by the defendant.

STATUTE INVOLVED

Section 3500 of Title 18 of the United States Code, in relevant part, provides:

* * * *

> (b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.
>
> (c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to

the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of such statement by said defendant and his preparation for its use in the trial.

(d) If the United States elects not to comply with an order of the court under paragraph (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

* * * *

STATEMENT

After trial by jury, petitioner was convicted on all counts of a three-count indictment charging the filing

of false statements with the Internal Revenue Service in violation of Sections 7206(1) and 7206(5)(B) of the Internal Revenue Code of 1954. He was sentenced to pay a fine of $3,000 and to be imprisoned for two years (R. 4-6).[1] The court of appeals unanimously affirmed his conviction (Pet. 19-24).

The false statements referred to in the indictment (R. 4-6) were two written statements of petitioner's financial condition (Gov't. Exs. 2 and 5) and a third document entitled "Offer in Compromise" (R. 21, Ex. 4). In the offer in compromise (Govt. Ex. 4) petitioner proposed to settle an income tax liability of $72,642.79 for the years 1942 through 1945, as well as any claims for the years 1946 through 1960, for $3,580. In the first financial statement (Govt. Ex. 2) petitioner answered "none" to the question, "Banks or other financial institutions with which you do business." In the other two documents received by the Internal Revenue Service on May 20, 1960, he stated that he had no assets and that the only asset he had disposed of for less than full value, since January 1, 1942, was his home in Newtonville, Massachusetts, which he had transferred to his first wife. The government's evidence showed that he had given between $75,000 and $80,000 in cash to his secretary between 1947 and January 12, 1953 (Tr. 335, 338, 339, R. 56, Supp. R. 48), that he did business with various banks, that he placed assets in the names of his children, and that he owned other assets.

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[1] "R." refers to petitioner's appendix in the court of appeals. "Supp. R." refers to the government's appendix in that court. "Tr." refers to the original transcript.

Two revenue agents testified at the trial, John J. Ford and Myles P. McCabe. The present petition is concerned with requests for their prior statements.

The direct examination of agent Ford[2] was confined to establishing the fact that petitioner came to the office of the Internal Revenue Service pursuant to summons on March 19, 1957, and, on that date, completed the first statement of financial condition (Govt. Ex. 2). It bears a signature, "Harmond E. Genstil," proved by a handwriting expert to be petitioner's (Supp. R. 51-64). Ford gave no testimony on direct examination concerning any oral statements made by petitioner, or any conversation with petitioner, except the following (Tr. 8-10):

> Q. Did Mr. Genstil appear at 174 Ipswich Street on March 19, 1957?
> A. He did, sir.
> Q. Mr. Ford?
> A. Yes, he did.
> Q. Did you see him there?
> A. I did.
> Q. Did you talk with him there?
> A. I did.
> Q. Will you state your conversation, please?
> * * * *[3]

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[2] The direct examination runs from page 6 to page 18 of the transcript, his testimony occupying about four pages, the remainder consisting of colloquies. The record appendices to the briefs in the court of appeals contain numerous omissions, not indicated in petitioner's record appendix. Consequently, the references given here will sometimes be to the original transcript.

[3] Objection by counsel is omitted.

THE COURT: Go ahead, Mr. Ford.

THE WITNESS: I asked Mr. Genstil to complete a financial statement and the reason for that is—

THE COURT: No, we don't want the reason, just the conversation.

THE WITNESS: O.K. To complete a financial statement. He completed it in part and then when he was part way through it he asked if he might call his attorney. I said, "There is no reason why you cannot." He went away, I believe, to a public phone.

THE COURT: He went away.

MR. LEVINE: No.

THE COURT: We don't care what you believe, we want the conversation, what you saw, not what you think.

THE WITNESS: Right. He went away, presumably to make the phone call.

MR. LEVINE: No.

THE COURT: Strike it out.

THE WITNESS. He came back and he took the financial statement that I had in front of me and wrote across the face of it "I have not assets," and he signed it and left it with me. He then left the office.

Q. I show you this paper and ask you whether or not this is the paper that he wrote across the face of it in your presence—

A. It is, sir, right.

In his remaining testimony on direct examination, the witness testified merely that, as to each answer written on the form, petitioner himself wrote it (Tr. 10-18), except only that the agent endorsed it, "On March 19, 1957, at Ipswich Street," to show the date the paper was received (Tr. 18).

On commencing his cross-examination, petitioner's counsel asked if the government had "a statement of this witness" and if so, that it be produced (R. 16-17). The prosecutor asked the witness if he had written any notes of his conversation with petitioner, and the witness said that he wrote them on the back of "our account tape," but that he subsequently delivered them to McCabe, another revenue officer who was then present in court (R. 17-18). On being asked, McCabe said that he did not have the notes with him, and the court ordered that they be produced "at the noontime recess, thirty minutes away," and that meanwhile counsel continue with his cross-examination (R. 18). Counsel acquiesced, "subject to my objection" (R. 18). The transcript (Tr. 18-100) shows that cross-examination occupied almost all the rest of that trial day. During this cross-examination, the prosecutor produced the requested notes and the following colloquy occured (Supp. R. 25):

> MR. LEVINE: Do you want me to suspend and look at it now?
>
> THE COURT: It is up to you. It was delivered to you in accordance with your instruction. You can finish this line.
>
> MR. LEVINE: They will continue to be available to me?
>
> MR. MADDEN: Yes.
>
> MR. LEVINE. Thank you.

The record shows no further requests, on that day, for the production of documents.

On the second day of the trial, McCabe testified on direct examination (Tr. 112-117) that petitioner came

to the revenue office on May 3, 1960, and stated "that he was on the verge of bankruptcy and wished to file an offer in compromise for about $5,000" (Supp. R. 26, Tr. 114). McCabe gave petitioner the compromise form and the financial statement form (Tr. 114), and no further conversation occurred (Supp. R. 26-27). Thereafter, on May 20, 1960, McCabe received the filled-in forms in the mail at the office (Tr. 115, Govt. Exs. 4 and 5).

At the outset of his cross-examination, petitioner's counsel requested that the prosecutor "produce a statement of this witness which is in the possession of the United States Government which relates to this subject matter, to which this witness has testified" (R. 21). The court ordered that any such statement be produced (R. 21-22). The prosecutor explained (R. 22; Tr. 119):

> MR. MADDEN: I gave to my brother yesterday papers that he requested. I believe that there are written statements on these papers that were inserted there by this witness. I think he made these notations, at least some of the notations that are on these papers.

The witness then stated that some of the notations or statements were his. The court instructed him not to read them but "to give it to Mr. Madden for delivery to Mr. Levine" (R. 23).

The prosecutor then asked if the witness had made any other written statements, and the witness answered (R. 23):

> THE WITNESS: There have been a number of different memoranda written in connection with

this case. If the specific question is, Have I written memoranda with respect to this specific offer in compromise, I don't recall that I have.

MR. LEVINE: That is not the question.

THE COURT: That is the question. It is the only thing he testified to on direct examination. Is this the only thing you have written concerning your direct testimony?

THE WITNESS: To the best of my recollection.

THE COURT: Deliver it to Mr. Levine.

Petitioner's counsel received the notes in question, on two sheets (R. 23-24). Counsel asked (R. 24) whether the witness had made "some notes with respect to Harmond Genstil, his tax liability, his offer of compromise, his statement of financial condition and other information that does not appear on two of these?" The witness answered, "I believe I did," but said he was "not sure" where they were. Thereupon petitioner's counsel stated, "I ask that this witness' testimony be stricken," and the court denied the motion (R. 24).

Petitioner's counsel, continuing the inquiry, asked if the witness had made "a memorandum of the substance of that conversation" (of May 3, 1960), and the witness answered that he had not, nor had anyone else to his knowledge (Tr. 123-124).[4] Counsel then proceeded with his cross-examination and made no further requests thereafter concerning the production of prior written statements.

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[4] These pages of the transcript are only partly reproduced (Supp. R. 27).

ARGUMENT

There is no merit to petitioner's contention (Pet. 12-14) that the district court, through lack of diligence, failed to protect petitioner's rights under the Jencks Act. The record shows that the court complied with every request for the production of documents, and petitioner's counsel did not request the court to undertake the further exploration of government files which petitioner now seeks. It is unnecessary to speculate now as to whether the further investigation which counsel could have requested would have uncovered anything useful to petitioner's defense.

The facts already stated clearly show that petitioner now seeks to blame the district court for his own counsel's inaction. Agent Ford acknowledged that he had made certain notes of his conversation with petitioner and those notes were delivered to petitioner's counsel while Ford was still on the stand, undergoing cross-examination. After the notes were delivered, counsel made no further inquiry or request with respect to prior statements (Supp. R. 25), but continued on with his cross-examination until, finally, the witness was excused, neither party having any further questions (Tr. 100).

On the following day, after McCabe testified briefly on direct examination, counsel asked for prior statements, and it was explained that the only notes he had made of his conversation with petitioner were written on some of the same sheets which had been delivered to counsel on the preceding day (R. 22). These

notes were again produced and delivered to counsel (R. 23). When the court asked if these were "the only thing you have written concerning your direct testimony," the witness replied in the affirmative. When counsel suggested that other statements might exist, the court said, "Take what he has and we will find out" (R. 23). Counsel then asked a broad question as to whether the witness had made any notes with respect to petitioner, "his tax liability, his offer of compromise, his statement of financial condition and other information that does not appear on two of these?" When the witness replied that he believed he had but did not know where they were, counsel made no inquiry of the prosecutor and requested no action by the court. Instead, he abruptly moved that the witness' testimony be stricken and the court properly denied the motion. Nor did counsel thereafter at any time ask that anything be produced or that any inquiry be made in search of material of possible use to him in his cross-examination. By further questioning of the witness, however, he elicited testimony that neither the witness, nor anyone else, to the witness' knowledge, had made any memorandum (aside from anything in the notes already delivered) concerning the conversation of May 3, 1960, the subject-matter of the witness' direct examination (Tr. 122-124).

Petitioner, in an attempt to show a dereliction of duty on the part of the court, argues (Pet. 13) that the court should have taken the motion to strike "as a signal * * * that the defendant was not satisfied * * *." He then cites cases (Pet. 13, 18) indicating

that, in given circumstances, a district court has an affirmative duty of inquiry, *viz.*, *Saunders* v. *United States*, 316 F. 2d 346 (C.A. D.C.); *Hilliard* v. *United States*, 317 F. 2d 150 (C.A. D.C.), and *United States* v. *Keig*, 320 F. 2d 634 (C.A. 7). But those decisions are wholly inapposite. In all of those cases defendant's counsel requested further action by the court for the production of documents acknowledged to be in existence, and in each instance the court refused. In *Saunders* the court evidently believed, erroneously, that notes of an interview made by a government attorney are immune from production. In *Hilliard* the court refused to order the production of a police report admittedly available. In *Keig* the prosecutor conceded that he had a general report on the case, written by the witness, but when counsel requested that the court inspect it, the court refused on the theory that an Internal Revenue report recommending the action to be taken in a case is not subject to production.

Here, it appears petitioner was shown every statement required to be produced. If there was any lack of diligence, it must be attributed to petitioner's own counsel, who, at the time, evidently chose to forego any further investigation into government files in a search for material useful for cross-examination. Proper judicial administration does not permit reopening the case on the basis of after-thoughts concerning requests that might have been made.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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APRIL, 1964

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